

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

Bruce A. Rogers, Esquire, P.A.
12 South Front Street
P.O. Box 876
Georgetown, DE 19947

Stephani J. Ballard, Esquire
Law Offices of Stephani J. Ballard, LLC
1308 Delaware Avenue
Wilmington, DE 19806

RE: ***Lester R. Shaffer, Shawn Brittingham, Bradley Cordrey, & Christopher Story v. William Topping, Ralph W. Holm, Jr. and Town of Georgetown***
C.A. No. S11C-01-004 RFS

Submitted: May 18, 2011
Decided: July 6, 2011

Upon Defendants' Motion to Dismiss. Granted in Part. Denied in Part.

Dear Counsel:

Plaintiffs in this case either are or were officers of the Georgetown Police Department ("GPD"). Plaintiffs are Lester Shaffer (who is no longer a member of GPD), Shawn Brittingham, Bradley Cordrey and Christopher Story. As a result of disciplinary action taken against them by GPD, Plaintiffs filed a Complaint in this Court against Defendants, alleging seven causes of action. This is my decision granting in part and

denying in part a motion to dismiss filed by Defendants William Topping, Ralph W. Holm and Town of Georgetown (“Georgetown” or “Town”), pursuant to Super.Ct.Civ.R. 12(b)(1) and (b)(6).

The Complaint alleges the following conduct:

1. Violations of the Law Enforcement Officers’ Bill of Rights (“LEOBOR”).
2. Retaliation by Defendants Topping and Holm in violation of due process.
3. Civil conspiracy.
4. Abuse of official power/violation of due process.
5. Slander.
6. Breach of Town and GPD policies.
7. Punitive damages.

For a full rendition of the facts, refer to my decision dismissing a petition for a writ of mandamus filed by three of the Plaintiffs in this case, not including Shaffer, who had already left GPD.¹ In sum, this action arises because of sanctions imposed on Plaintiffs by Defendants after Plaintiffs violated Topping’s order not to discuss police business with anyone outside GPD. Plaintiffs admitted having met with Sue Barlow, a Town Council member to discuss their dissatisfaction with Topping’s and Holm’s leadership. Following an investigation into this conduct, each Plaintiff was found to have committed one count of insubordination and each received a written reprimand. As the result of an internal appeal process, the findings of insubordination were affirmed, and Plaintiffs received harsher sanctions from Topping.

¹*Brittingham v. Town of Georgetown*, C.A. No. S10M-09-023, June 28, 2011.

All Plaintiffs but Shaffer petitioned the Court for a writ of mandamus, which was dismissed on Defendants' motion for summary judgment. This Court found as a matter of law that Plaintiffs had not met the burden for mandamus and therefore summary judgment was appropriate. *See Brittingham, supra.*

Shaffer filed a Complaint alleging hostile work environment and other counts, which Judge Graves dismissed on March 31, 2011. Plaintiffs also filed an action in accordance with the Public Employment Relations Act, which is pending. *See 19 Del. C. Ch. 13.*

If the Court lacks subject matter jurisdiction over a complaint or a particular cause of action, dismissal is appropriate.² On a motion to dismiss for failure to state a claim, the Court must accept as true all well-pled allegations in the complaint.³ The test for sufficiency is broad, that is, whether the plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.⁴

In this case, Defendants argue lack of jurisdiction over the action because they are immune from suit pursuant to the County and Municipal Tort Claims Act ("CMTCA" or "the Act"). *See Title 10 Del. C. § 4010--§ 4013.* The Act is intended to provide a broad

²*Janowski v. Div. of State Police*, 2009 WL 537051 (Del. Super.).

³*In re Benzene Litigation*, 2007 WL 625054 (Del. Super.).

⁴*Spence v. Funk*, 396 A.2d 967 (Del. 1978).

statutory base for the invocation of immunity.⁵

Section 4011(a) of the Act provides in part that “all governmental entities and their employees shall be immune from suit on any and all tort claims seeking recovery of damages.” A “governmental entity” is defined in § 4010 to include any municipality, town or county. An exclusive list⁶ of exceptions to §4011 immunity is presented in § 4012, including negligent acts or omissions causing property damage, bodily injury or death. These are the only actions for which municipal immunity is waived.⁷ None of the exceptions has been pled in this case, nor does the Complaint allege negligent conduct. Because several counts in the Complaint are not tort claims, the Court addresses each count individually.

Count One alleging LEOBOR violations is straightforward. The Complaint raises the same facts and issues that were raised in the mandamus petition, which this Court dismissed because Plaintiffs failed to show the right to performance of a clear legal or ministerial duty. Thus, Plaintiffs are collaterally estopped from raising this claim.⁸ Moreover, the LEOBOR claim is a tort action for which Plaintiffs seek damages, and

⁵*Sadler v. New Castle County*, 565 A.2d 917 (Del.); *Moore v. Wilmington Housing Auth.*, 619 A.2d 1166 (Del. 1993).

⁶*Sussex County v. Morris*, 610 A.2d 1354 (Del. 1992).

⁷*Id.*

⁸*Smith v. Guest*, 16 A.3d 920 (Del.) (claim will be collaterally estopped if the same factual issue was presented in both cases, the issue was litigated and decided in the first suit, and the determination was essential to the prior judgment).

Defendants are statutorily immune from such suit.

Count Two alleges that Defendants Topping and Holm retaliated against Plaintiffs for exercising their constitutional right to free speech by talking with Council Member Barlow. An alleged First Amendment violation is not a tort, and there is no municipal immunity from a properly pled constitutional claim.⁹ However, a civil rights action for retaliation for exercising free speech is properly pled under 42 U.S.C § 1983.¹⁰ A plaintiff must allege that (1) the plaintiff engaged in protected activity, which in the realm of public employee speech is not a simple matter;¹¹ (2) a state official responded by retaliation; and (3) the protected activity was the cause of the retaliation.¹²

Here, Plaintiffs do not plead under § 1983, but they do assert that their discussions with Barlow were protected speech and that the resulting sanctions were imposed in retaliation for criticizing Topping and Holm behind their backs. Accepting the factual allegations as true and bearing in mind that the test of sufficiency of a complaint is broad,

⁹See, e.g., *Conley v. State*, 2011 WL 113201 (Del. Super.); *Heaney v. New Castle County*, 672 A.2d 11 (Del. 1995).

¹⁰Section 1983 provides a remedy against any person who, under color of state law, deprives another of rights protected by the federal Constitution. *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 120 (1992). Municipalities are among those persons to whom § 1983 applies. *Id.* For examples of § 1983 First Amendment employment speech claims resolved in the Superior Court of Delaware, see *Conley v. State*, 2011 WL 113201 (Del. Super.); *Abbott v. Gordon*, 2008 WL 821522 (Del. Super.).

¹¹To get a sense of the numerous factors involved in a public employee's civil rights action for free speech, see, e.g., *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

¹²*Abbott v. Gordon*, at *8.

the Court cannot conclude that there is no reasonably conceivable set of circumstances susceptible of proof on this claim.¹³ Defendants' motion to dismiss is **DENIED** as to the alleged First Amendment retaliation claim.

Plaintiffs also claim retaliation for exercising their statutory and contractual rights to address grievances. They have not identified a statute or contract which permits them to ignore an order issued by Chief Topping. This claim is dismissed.

Count Three alleges civil conspiracy. Defendants Topping and Holm allegedly conspired to penalize Plaintiffs for exercising free speech and seeking the rights guaranteed to them under LEOBOR. The free speech allegation survives, *supra*, but Plaintiffs are collaterally estopped from raising the LEOBOR claim, and Defendants enjoy immunity on this tort action, *supra*.

Plaintiffs also assert that Topping and Holm conspired together and possibly with others to interfere with Plaintiffs' ability to perform as police officers of the GPD. Plaintiffs seek damages for injury to their reputations and their jobs. Civil conspiracy is a common law tort seeking damages,¹⁴ and Defendants are immune from any such action, pursuant to § 4011 of the CMTCA.

Count Four alleges that Topping and Holm abused their power and violated due process by willfully refusing to protect Plaintiffs from Defendants' own conduct. In

¹³*Spence v. Funk, supra.*

¹⁴*Nicolet, Inc. v. Nutt, 525 A.2d 146 (Del. 1987).*

addition to being circular, these allegations are vague and do not allege abuse of power¹⁵ other than to refer to the “debilitating nature of the ongoing pattern of [Defendants’] conduct.” Complaint ¶ 48. Section 4011(a) makes no distinctions as to a defendant’s state of mind, so Plaintiffs’ allegations of intentional, blatant, willful, deliberate, reckless, malicious, egregious conduct are just such so much verbiage.¹⁶

Furthermore, although Count Four is captioned in part as a violation of due process, Plaintiffs make no reference to due process in their allegations. Nor do they plead under § 1983. It follows that Plaintiffs are not stating or otherwise pursuing a constitutional due process claim.

As to their assertion of abuse of power, Plaintiffs fail to provide a basis for the claim, but succeed nicely in listing their injuries – “public and private humiliation, embarrassment, mental anguish, financial and economic hardship and loss.” Plaintiffs have not alleged a due process violation. Count Four claims damages for unsupported abuse of power, to which Defendants are immune from suit.

¹⁵Under § 1983, two elements are involved in an allegation of abuse of power is raised against a municipality: whether the plaintiff’s harm was caused by a constitutional violation, and, if so, whether the city or town was responsible for that violation. *Collins v. City of Harbor Heights*, 112 S.Ct. 1061, 1065-66 (1992).

¹⁶Section 4011(c) permits an employee’s personal liability for property damage, bodily injury or death if the acts were not within the scope of employment or were performed with “wanton negligence or willful and malicious intent.” Plaintiffs make no claim pursuant to this section.

In Count Five, Plaintiffs allege that Topping and Holm slandered them, including publically referring to the seven officers who were investigated as “the back-stabbing seven.” Complaint at ¶ 52. Count Five further alleges that Topping and Holm made false statements about them while discussing personnel matters with unidentified individuals. Plaintiffs allege injuries including public humiliation, embarrassment, mental anguish, emotional and financial harm and economic loss. Pursuant to § 4011 of the CMTCA, Defendants are immune from suit on the allegation of slander, which is a tort claim seeking recovery of damages.

Count Six alleges violations of Georgetown and GPD policies. Plaintiffs assert that Topping and Holm deprived them of their rights under Georgetown’s personnel policies and GPD’s policies for processing grievances and appeals, that is, LEOBOR. Plaintiffs are collaterally estopped from raising the LEOBOR argument, and Defendants are immune from this tort claim.

As to Town personnel policies, Count Six does not identify which policy or policies are implicated in this claim. Viewing the Complaint as a whole, the Court infers that Count Six pertains to the fact that Town Council affirmed the penalties imposed on Plaintiffs by Topping and Holm. Town Council is not subject to supervision by GPD, nor is Town Council a named defendant in this action.¹⁷ Moreover, this Court has no jurisdiction over Town Council. The claim of violation of Town policies is dismissed for

¹⁷The Town of Georgetown is a named defendant, but Plaintiffs do not argue *respondeat superior*.

lack of jurisdiction.

Count Seven seeks compensatory damages and punitive damages. Compensatory damages aim to correct private wrongs, while assessment of punitive damages implicates other societal policies.¹⁸ Pursuant to § 4011, Defendants are immune from tort actions for compensatory damages. The threshold for punitive damages is reckless or willful misconduct or wanton misconduct.¹⁹ However, municipalities are immune under § 4011 even if its employee's conduct is alleged to be reckless/wanton or willful and wanton.²⁰ Section 4011(a) explicitly provides that governmental entities and their employees are immune from all tort claims seeking damages. Count Seven is dismissed pursuant to the CMTCA.

For all these reasons, Defendants' motion to dismiss is **GRANTED** as to Count I, Count III, Court IV, Count V, Count VI and Count VII. Defendants' motion is **DENIED** as to Count II.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

Original to Prothonotary

¹⁸*Jardel Co., Inc. v. Hughes*, 523 A.2d 518 (Del. 1987).

¹⁹*Schueler v. Martin*, 674 A.2d 882 (Del. Super. 1996).

²⁰*Id.* at 889.

